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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

TEXAS
COURT OF CRIMINAL APPEALS
10/5/2017
DEANA WILLIAMSON, CLERK

NO. 09-15-00161-CR
In the Court of Appeals for the
Ninth District of Texas at Beaumont

ARMAUD SEARS, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

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ATTORNEYS FOR THE STATE

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Pursuant to Rule 68.4 of the Texas Rules of Appellate Procedure, a complete list of the names of all interested parties is below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

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Trial Court:	Criminal District Court of Jefferson County, Texas Honorable Larry Gist presiding
Court of Appeals:	Ninth Court of Appeals, Honorable Justices Charles Kreger, Hollis Horton, and Leanne Johnson

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A grand jury indicted Armaud Sears ("Appellant")[1] with the felony offense of aggravated robbery.[2] Upon Appellant's plea of "not guilty," a jury found him guilty as charged and assessed his punishment at twenty-five years in prison and a $10,000 fine.[3] The trial court sentenced Appellant in accordance with the jury's verdict.[4] Appellant filed a timely written notice of appeal.[5] On January 31, 2017, in an unpublished opinion, the Ninth Court of Appeals reversed Appellant's conviction for aggravated robbery, modified the judgment to render a conviction for robbery, reformed the judgment to delete the deadly weapon finding, affirmed the finding of guilt as modified, and reversed and remanded the cause as to punishment. *See Sears v. State*, No. 09-15-00161-CR, 2017 WL 444366, at *23 (Tex. App.—Beaumont Jan. 31, 2017, pet. granted) (mem. op., not designated for publication). The Court of Appeals found the evidence insufficient to support the aggravating element of the offense—that Appellant, as the getaway driver, was aware that any firearm or other deadly weapon would be, was being, or had been

[1] *See* Tex. R. App. P. 3.2 (providing that parties should be referred to as "the State" and "the appellant" in documents filed in criminal appeals).

[2] CR: 6.

[3] CR: 64, 74, 89.

[4] CR: 89

[5] CR: 96.

use or exhibited during the offense. *Id*. at *9–10. The State filed a motion for rehearing, which the Court of Appeals denied on February 21, 2017. The State timely filed its petition for discretionary review on March 22, 2017. *See* Tex. R. App. P. 68.2(a). This Court granted the State's petition on September 13, 2017, with the notation that oral argument will not be permitted.

GROUND FOR REVIEW

Does the record contain no evidence that Appellant was aware that any firearm would be, was being, or had been used or exhibited during the robbery, as the Ninth Court of Appeals held, when there is evidence that one of the intruders carried a long, rifle-like gun and that Appellant transported this intruder to Brown's house directly before the robbery?

STATEMENT OF FACTS

In the early morning hours of March 8, 2013, Laura Brown[6] was at her home located on Daisy Street in Beaumont, Texas with her boyfriend Kadrian Cormier and her two children.[7] Brown and Cormier were sleeping in the bedroom when Brown was awakened by a banging noise coming from the back door of her

[6] In its memorandum opinion, the Court of Appeals referred to the victim in this case by an alias to protect the victim's identity. *See Sears v. State*, No. 09-15-00161-CR, 2017 WL 444366, at *1 n.2 (Tex. App.—Beaumont Jan. 31, 2017, pet. granted) (mem. op., not designated for publication). For ease of reference, and to avoid confusion, we will use the same alias throughout the State's brief.

[7] 3RR: 51–55.

house and screaming, "Beaumont Police, open the door."[8] Brown woke up Cormier, and they immediately got up and began walking down the hallway toward the back door to investigate.[9] Before they reached the end of the hallway, three men broke into the home through the back door.[10] Brown turned and attempted to run, but one of the men grabbed her, put her in a chokehold, and held a gun to her head.[11] When she turned, she could no longer see Cormier.[12] However, she noticed that her daughter had gotten out of bed to see what was happening, so Brown dropped to her knees to get out of the chokehold and crawled towards her daughter.[13] The man reestablished the chokehold and continued to hold a gun to her head, which Brown believed to be a 9-millimeter black handgun.[14] The man then forced her into her bedroom and onto the bed, and eventually he let her daughter join her there.[15] Another man grabbed her son and held him at gunpoint while walking around the house to make sure no one else was there.[16] Eventually, the men let her son join her on the bed as well.[17]

[8] 3RR: 55, 65, 125; 4RR: 37.
[9] 3RR: 55, 98, 125.
[10] 3RR: 55–56, 125.
[11] 3RR: 56, 57.
[12] 3RR: 65.
[13] 3RR: 57–58.
[14] 3RR: 58.
[15] 3RR: 59.
[16] 3RR: 60.
[17] 3RR: 61.

Meanwhile, when Cormier saw the intruders, he immediately ran to the bathroom and escaped through the bathroom window.[18] Once outside the house, Cormier jumped over the fence and ran to the front of Brown's house where he saw a red Toyota Tundra pick-up truck in front of Brown's house, near the driveway.[19] Cormier got into the truck, which Appellant was driving.[20] Appellant proceeded to drive outside of Brown's neighborhood.[21] Cormier asked Appellant if he could use Appellant's cell phone to call 911.[22] Appellant responded, "no, I'm talking to my mother and my battery is about to die."[23] However, Cormier could hear a male voice coming through the phone's speaker, and Appellant referred to whomever he was talking to as a "dude."[24] Cormier became suspicious that the driver of the truck was somehow involved in the aggravated robbery.[25] Cormier asked to get out of the truck.[26] The driver responded to Cormier's request, "I bet you do, mother F'er."[27] Because the driver did not let him out of the vehicle, Cormier jumped out of the truck and flagged down another vehicle, borrowed the driver's phone to call police, and then asked the driver to return him to Brown's

[18] 3RR: 98, 111; 4RR: 39.
[19] 3RR: 98–99, 113; 4RR: 39.
[20] 3RR: 98–99; 4RR: 51, 53, 56–57.
[21] 3RR: 113.
[22] 3RR: 99.
[23] 3RR: 99.
[24] 3RR: 99; 4RR: 39–40.
[25] 3RR: 99; 4RR: 39–40.
[26] 3RR: 99.
[27] 3RR: 100.

residence.[28] The second vehicle followed behind the Toyota Tundra truck long enough for Cormier to obtain the license plate number—CA09547.[29]

Brown testified that each of the three intruders that entered her home carried guns, and she described two of the guns as handguns and the third gun as a "long gun."[30] One of the investigating officers testified that Brown gave a sworn statement shortly after the robbery.[31] In her statement, Brown identified the long gun as "a rifle."[32] In speaking to officers, she described the gun as long, "big[,] and black."[33] The record reflects that the officer who took Brown's statement indicated that Brown seemed unfamiliar with weapons, and though she referred to the long gun as a rifle, it could have been a rifle or a shotgun.[34] Regardless, at trial, it was undisputed that Brown's description of the long gun was such that it was reasonable to understand her testimony as stating that one of the intruders carried either a rifle or a shotgun.[35]

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[28] 3RR: 100, 115.
[29] 3RR: 99–101.
[30] 3RR: 87.
[31] 4RR: 37.
[32] 4RR: 44.
[33] 3RR: 132; 4RR: 70.
[34] 4RR: 44.
[35] *See* 4RR: 97–98. In response to an objection during his closing argument, defense counsel stated, "But I think the officers testified that there were four people and she may have said three or four, but then she starts talking about the guns that they had. And, I mean, you don't have to be a gun expert to know the difference between a long gun and a handgun. And what did she say? First of all, they had guns. Secondly -- first she says there was one long gun, which I would take to mean either a rifle or a shotgun, but then she says they had long guns and short guns." *See* 4RR: 97–98.

The three intruders threatened Brown and her two children and held them at gunpoint throughout the robbery.[36] Brown was in fear for her life and for the lives of her children.[37] Brown told officers that one of the suspects held her face into the mattress of her bed and "kept yelling at her just shut the F up or I will kill you."[38] The men looked under her bed and found a shoebox containing a substantial amount of money.[39] They took the money from the shoebox and some jewelry, and then they left.[40] From his investigation of the crime scene and speaking to witnesses, one officer believed that the intruders knew what they were looking for when they entered the house.[41] Before leaving, they told Brown and her children to stay on the bed with their heads down and wait five minutes before getting up.[42] After five minutes, Brown got up, closed and locked the bedroom door, and then called 911.[43] Brown recalled that about ten to fifteen minutes after she called the police, Cormier returned.[44]

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[36] 3RR: 57, 60, 63, 104–105, 108.
[37] 3RR: 60, 62–63, 74–75.
[38] 3RR: 105.
[39] 3RR: 53–54; 61.
[40] 3RR: 61–62.
[41] 3RR: 128, 136.
[42] 3RR: 62.
[43] 3RR: 62, 75.
[44] 3RR: 75.

One eyewitness driving down a nearby road, observed a red truck backing up towards him on the roadway.[45] He watched as three men crawled out of the ditch that runs behind Brown's neighborhood and then jumped into the red truck.[46] He found this behavior suspicious, so he called 911 around 6:01 a.m. and reported what he had observed.[47] The witness reported the truck had a license plate with the number CA09547.[48] The witness testified that from what he observed, it looked as if the driver of the red truck wanted to pick the men up.[49] He explained that, "It appeared that what happened was the truck drove past the ditch and had to stop and then went in reverse and was backing up to get to the ditch where they were running out of."[50] The eyewitness testified he was unable to see the men's faces or if they carried anything in their hands.[51] In the 911 recording, the eyewitness indicated that he could not see their hands because of the positioning of the truck.[52] The eyewitness recalled that the men were wearing dark hoodies, which they had pulled over their heads.[53]

[45] 4RR: 11–12.
[46] 3RR: 126; 4RR: 11–13.
[47] 4RR: 13.
[48] 3RR: 127.
[49] 4RR: 14.
[50] 4RR: 14.
[51] 4RR: 12, 14.
[52] 5RR: Ex. 46- DVD containing 911 Recordings.
[53] 5RR: Ex. 46- DVD containing 911 Recordings.

Even though the eyewitness testified he did not see any guns, defense counsel questioned him concerning the visibility and ease of concealing a long gun. The eyewitness testified that a long gun— like a shotgun or rifle as described by Brown— is a bulky item and unlike a handgun, could be seen by others in view of the carrier of the weapon.[54]

One of the investigating officers described the aggravated robbery in such a way that it was clear the robbery had been planned and that the intruders, including the getaway driver knew the plan.[55] An officer ran the license plate number provided by Cormier and discovered that the red Toyota Tundra was registered to an automobile rental company in Oklahoma and had been rented to Crystal Foxall.[56] Crystal Foxall testified that in February of 2013, Appellant asked her to rent a truck for him, and she rented the red Toyota Tundra truck on his behalf.[57] Two days after the aggravated robbery, a patrol officer located Appellant driving the same red Toyota Tundra with license plate CA09547.[58] Appellant spoke with the investigating officer and denied any participation in the robbery, but he admitted that he was in the area that morning driving the red Toyota Tundra

[54] 4RR: 15–16.
[55] 3RR: 128–29, 133, 136.
[56] 3RR: 110; 4RR: 42–43.
[57] 4RR: 18, 19, 21.
[58] 4RR: 54.

truck.[59] Appellant claimed he was meeting a girl at 6 a.m., though he did not give the officer the girl's name or the specific location where he was to meet her.[60]

There was also evidence presented at trial to indicate that Appellant is a known drug dealer who specializes in targeting other dealers.[61] The jury also heard evidence that Brown's boyfriend at the time, Cormier, was a known drug dealer.[62] Finally, the jury heard recordings of phone calls Appellant made while in jail during which he spoke to others about the aggravated robbery and the actors involved.[63]

SUMMARY OF THE STATE'S ARGUMENT

There is sufficient evidence in the record to show that Appellant participated in the aggravated robbery with the knowledge that a deadly weapon would be, was being, or had been used or exhibited during the robbery. The evidence shows that two of the men that broke into Brown's home carried handguns; however, one man carried a long, rifle-like gun. The evidence also shows that Appellant was in front of Brown's home in a red Toyota Tundra truck within minutes of the start of the break-in. The jury heard testimony that the type of long gun Brown described is a bulky item not easily concealed.

[59] 4RR: 57.
[60] 4RR: 63.
[61] 4RR: 74–75.
[62] 4RR: 73.
[63] 4RR: 82.

In conducting its sufficiency analysis, the Court of Appeals erroneously rejected the argument that the jury could draw a reasonable inference from these facts that Appellant not only picked the intruders up at the conclusion of the robbery, but he also transported the intruders to the house and would have seen the long, rifle-like gun and known it would be used in the robbery. It is a reasonable inference that Appellant would have observed that one of the intruders he transported to Brown's house in the Toyota Tundra truck was carrying a long, rifle-like gun.

The jury implicitly found beyond a reasonable doubt that Appellant participated in the aggravated robbery with the knowledge that a deadly weapon would be, was being, or had been used or exhibited during the robbery. This determination was not so outrageous that no rational trier of fact could agree. The Court of Appeals, in acting as the thirteenth juror, apparently disagreed with the jury's reasonable inferences and resolution of the facts instead of showing it proper deference. Had the Court of Appeals properly considered the combined and cumulative force of all the evidence including reasonable inferences therefrom and viewed the evidence in the light most favorable to the jury's verdict, it would have found sufficient evidence and affirmed Appellant's conviction.

ARGUMENT AND AUTHORITIES

SUFFICIENT EVIDENCE SUPPORTS APPELLANT'S CONVICTION FOR AGGRAVATED ROBBERY.

A person commits aggravated robbery if, (1) in the course of committing theft, and (2) with intent to obtain or maintain control of property, (3) he knowingly or intentionally (4) threatens or places another in fear of imminent bodily injury or death, and (5) uses or exhibits a deadly weapon. Tex. Penal Code Ann. §§ 29.02(a), 29.03(a)(2) (West 2011). A firearm is a deadly weapon. *Id*. § 1.07(a)(17) (West Supp. 2015). Here, the indictment alleged that Appellant committed aggravated robbery on or about March 8, 2013.[64] The indictment specifically charged that Appellant, "while in the course of committing theft of property owned by [Brown] . . . and with intent to obtain and maintain control of said property, intentionally and knowingly threaten and place [Brown] in fear of imminent bodily injury and death, by using and exhibiting a deadly weapon, to-wit: a firearm."[65] The State's theory at trial was that Appellant was the getaway driver.[66] The State was therefore required to prove that Appellant knew his co-conspirators would commit the aggravated offense. And, by its guilty verdict, the jury implicitly found, beyond a reasonable doubt, that Appellant, in fact, knew a

[64] CR: 6.
[65] CR: 6.
[66] 3RR: 46–47.

fiream or other deadly weapon would be, was being, or had been used or exhibited in the commission of the robbery. *See Sarmiento v. State*, 93 S.W.3d 566, 570 (Tex. App.—Houston [14th Dist.] pet. ref'd) (op. on reh'g, en banc); *see also Wyatt v. State*, 367 S.W.3d 337, 341 (Tex. App.—Houston [14th Dist.] 2012, pet. dism'd). Nevertheless, the Court of Appeals held the State's evidence insufficient to prove this necessary element. *See Sears*, 2017 WL 444366, at *10.

I. Standard of Review

In reviewing the sufficiency of the evidence to support a conviction, the critical inquiry is whether, after viewing the evidence in a light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014); *Acosta v. State*, 429 S.W.3d 621, 624–25 (Tex. Crim. App. 2014). This standard recognizes that the trier of fact is responsible for fairly resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *see Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015); *Adames v. State*, 353 S.W.3d 854, 860–61 (Tex. Crim. App. 2011). "Because the jury is the sole judge of a witness's credibility, and the weight to be given the testimony, it may choose to believe some testimony and disbelieve other testimony." *Lancon v. State*, 253 S.W.3d 699, 707 (Tex.

Crim. App. 2008). The appellate court defers to the fact-finder's determinations of credibility and weight and may not substitute its judgment for that of the fact-finder. *Jackson*, 443 U.S. at 319, 326; *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). The evidence is sufficient if "the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict." *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). The State is not required to disprove all reasonable alternative hypotheses that are inconsistent with the defendant's guilt. *Id*.

A reviewing court may not re-evaluate the weight and credibility of the evidence and substitute its judgment for that of the fact-finder—i.e., the reviewing court must avoid acting as the thirteenth juror. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012); *Brooks*, 323 S.W.3d at 911–12. The appellate court's role is to determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray*, 457 S.W.3d at 448 (quoting *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). And, when the record supports conflicting inferences, the appellate court is required to presume the fact-finder resolved the conflicts in favor of the verdict and defer to that determination. *Id*. at 448–49.

"Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015). When considering the circumstantial evidence supporting a conviction, it is improper for the court to employ a "'divide-and-conquer'" approach, looking at each inference or piece of evidence offered to support the verdict separately. *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012). Rather, the court must consider the combined and cumulative force of all the evidence in the light most favorable to the judgment to determine if sufficient evidence supports the conviction. *Id*.

In addressing another court's application of the *Jackson* sufficiency of the evidence standard, the U.S. Supreme Court explained that this deferential standard does not permit a "fine-grained factual parsing" through the record. *Coleman v. Johnson*, 566 U.S. 650, 132 S. Ct. 2060, 2064 (2012). "[I]t is the responsibility of the jury—not the court— to decide what conclusions should be drawn from evidence admitted at trial." *Id*. In reversing the lower court's order overturning the conviction, the U.S. Supreme Court concluded that the jury was convinced that the co-conspirator knew the principal offender was armed with a shotgun when the principal offender was noticeably concealing a bulky object under his trench coat,

the principal offender had been stating all day that he intended to kill the victim, and the co-conspirator helped usher the victim into the alleyway to meet his fate. *Id*. at 2065. According to the Supreme Court, "the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." *Id*.

The State maintains that this Court should reverse the Court of Appeal's decision because the Court of Appeals failed to consider the reasonable inferences that support Appellant's conviction and instead concluded the conviction was based only on speculation. *See Sears*, 2017 WL 444366, at *10. Because the distinction between a reasonable inference and speculation is critical to the disposition of this case, the subject warrants additional discussion. This Court has spoken to this issue a number of times, most notably in *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). In *Hooper*, this Court held that juries are allowed to draw multiple reasonable inferences to reach a verdict, but each inference must be supported by the evidence presented at trial. *Id*. Juries are "not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Id*. The correct application of the *Jackson* standard of review requires courts of appeals to understand the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption. *Id*. at 16. The Court defined "a presumption" as "a legal inference

that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt." *Id*. The Court defined "an inference" as "a conclusion reached by considering other facts and deducing logical consequence from them." *Id*. And, "[s]peculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." *Id*. With these principles in mind, we turn to the appellate record to consider the charges against Appellant and the evidence supporting his conviction.

II. Criminal Liability as a Party to the Offense

Section 7.02(a)(2) of the Texas Penal Code provides that a person is criminally responsible for another person's conduct if "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense[.]" Tex. Penal Code Ann. 7.02(a)(2) (West 2011). To convict someone as a party to an offense, the evidence must show that at the time of the offense, the parties were acting together, each doing some part to further the common purpose. *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985); *Brooks v. State*, 580 S.W.2d 825, 831 (Tex. Crim. App. 1979). Party liability for the use or exhibition of a deadly weapon as an aggravating element of the offense of robbery requires "'direct or circumstantial evidence that appellant not only participated in the robbery before, while, or after a [deadly weapon] was displayed, but did so while being aware that

the [deadly weapon] would be, was being, or had been, used or exhibited during the offense.'" *Wyatt*, 367 S.W.3d at 341 (quoting *Anderson v. State*, No. 14-00-00810-CR, 2001 WL 1426676, at *1 (Tex. App.—Houston [14th Dist.] Nov. 15, 2001, pet. ref'd) (not designated for publication)); *see also Sears*, 2017 WL 444366, at *9. That is, "the State must prove the defendant was criminally responsible for the aggravating element." *See Stephens v. State*, 717 S.W.2d 338, 340 (Tex. Crim. App. 1986).

III. In applying the law identified above, it is clear that when viewed in the light most favorable to the jury's verdict, the direct and circumstantial evidence presented at trial and the reasonable inferences drawn therefrom are sufficient to support the jury's verdict.

The Court of Appeals appears to have disregarded the circumstantial evidence in this case in failing to acknowledge two key pieces of evidence from which the necessary inferences flow. First, the evidence in the record supports a reasonable inference that Appellant transported the intruders to Brown's house directly before the robbery. The evidence at trial shows that as the intruders broke into Brown's house, Cormier immediately escaped from the house through a back window. He ran to the front yard where he found Appellant in the red Toyota Tundra pick-up truck by Brown's driveway in front of the house. In conjunction with all the other evidence in this case, from this evidence, the jury could have reasonably inferred that Appellant had driven the intruders to Brown's house and

dropped them off to commit the aggravated robbery and was waiting for their return when Cormier entered Appellant's truck.

Second, the evidence in the record supports a reasonable inference that at least one of the intruders exhibited his weapon to Appellant before the robbery and that Appellant would have known it was his intent to use the weapon in the robbery. The direct evidence in the case shows that the intruders were each carrying guns when they broke into Brown's house. Brown informed officers that one of the intruders exhibited a long gun, which at one point she called a rifle. The jury heard testimony from an uninterested eyewitness that the type of gun Brown described to officers was a bulky item that would be difficult to conceal. That same witness testified that the men were all wearing dark hoodies. There is no testimony or evidence that anyone wore a large overcoat, which might be capable of concealing such a large weapon. In defense counsel's closing argument, he drew the jury's attention to the fact that the eyewitness testified that he was unable to see whether the men that jumped into Appellant's truck after the robbery had guns. Defense counsel's argument to the jury shows the reasonableness of the inference the State is asking this Court to acknowledge:

> [The eyewitness] calls 911 and we know he wasn't involved in this deal, but he didn't see them running with a long gun, one or more of them didn't have long guns. And if you are running it's going to be easy to tell if you have got a shotgun or a rifle. Those of you-all that aren't familiar with guns may not be familiar with guns, but you are

> going to know that. Nobody says anything about any guns. Now, hand guns, yeah, it's possible to put them in their belt or something like that, but not long guns. And they obviously didn't put them over their shoulder or he would have seen that.[67]

Defense counsel contrasts the difference between concealing a handgun and concealing a rifle or shotgun. Long guns are far more difficult to conceal, and they require the carrier to take greater measures to avoid being noticed. Here, there is no evidence that the intruder took any type of measure to conceal the long, rifle-like gun before he entered the house. The evidence shows that he was wearing a hoodie and some type of pants. It is undisputed that he could not have hidden the rifle in his pants or under his hoodie. In fact, that is the very argument made by the defense at trial.

In its memorandum opinion, the Court of Appeals cited *Wyatt v. State* as support for its conclusion that there is no evidence that Appellant knew or saw the intruders' guns before or after the robbery. *See Sears*, 2017 WL 444366, at *10. However, *Wyatt* is distinguishable. *See Wyatt*, 367 S.W.3d at 338–43. In *Wyatt*, two men participated in the offense, the person who committed the actual bank robbery and the getaway driver. *Id.* at 338–40. The bank robber wore a vest, a long-sleeved shirt, and carried a black trash bag. *Id*. at 338. As he approached the bank teller, he "brandished a gun[.]" *Id*. In its opinion, the Fourteenth Court of

[67] 4RR: 98.

Appeals did not identify the type of gun used by the bank robber. However, from its opinion and the cases the court distinguishes therein, it appears there was evidence that the gun was not only capable of concealment but was actually concealed and only exhibited when the robber approached the bank teller inside the bank. *See id*. at 338, 342–43. The court concluded that there was a complete lack of evidence that the getaway driver knew that a firearm would be, was being, or had been used by the person committing the robbery. *Id*. at 341–42. The court found that the State presented no evidence that the person committing the robbery exhibited or otherwise made the getaway driver aware of the firearm at any time before or after the robbery. *Id*. at 341.

Here, there were at least four people involved in the robbery—Appellant and the three intruders who entered Brown's home. According to Brown, all three intruders carried firearms—two had handguns and one man entered her home with a long, rifle-like gun. It is conceivable that the two intruders carrying handguns could potentially hide their guns in a waistband; however, as argued by defense counsel at trial, the third intruder would have had a much more difficult and challenging task of trying to hide a long, rifle-like gun in his waistband or otherwise concealing it. In fact, there is no affirmative evidence in the record that the intruder attempted to conceal the long gun. There is no evidence that he wore a long overcoat, carried an extra-large bag, or any other evidence to support that he

was capable of concealing this large weapon from the view of others around him, including Appellant. Even to consider the various extreme methods he could have employed to hide this large weapon from his co-conspirators requires the type of speculation and hypothesizing this Court has rejected. There is not a single fact in the record to allow this Court to reach the conclusion that the large weapon was not visible to those riding in the truck with the carrier, including Appellant. Unlike *Wyatt*, here, the State introduced evidence that allowed the jury to reasonably conclude that Appellant was aware that at least one of the intruders had a firearm, a large deadly weapon, described as a long, rifle-like gun.

In support of its conclusion in *Wyatt*, the Fourteenth Court of Appeals cited to *Kanneh v. State*, No. 14-00-00031-CR, 2001 WL 931629, at *2 (Tex. App.—Houston [14th Dist.] Aug. 16, 2001, pet. ref'd) (not designated for publication). *See Wyatt*, 367 S.W.3d at 341, 343. *Kanneh* is also distinguishable from this case. In *Kanneh*, the appellant was convicted of aggravated robbery as a party because he was present during a robbery in which his companion used a knife. *Kanneh*, 2001 WL 931629 at *1–2. The court held that "[a]lthough it would intuitively seem likely that appellant would have known of or seen his companion's knife before, during, or after such an encounter, without at least circumstantial evidence to support it, such a conclusion cannot properly be based on speculation or

assumption." *Id*. at *3. In *Kanneh*, there was affirmative evidence that the appellant's companion actively sought to conceal the deadly weapon— a knife— from the appellant. *Id*. at *2. The court concluded that the evidence was insufficient to support the conviction. *Id*. at *2–3. In its analysis, the court explained,

> In the absence of evidence suggesting any actual awareness by appellant of the knife, we believe that evidence would at least be necessary to support an inference that in the manner the knife was handled before, during, or after the robbery, it would have been visible to someone in the area where appellant was positioned at those times or some mention was made of it by someone in appellant's presence.

Id. at *2. Unlike the small knife in *Kanneh*, the weapon in this case is a long, rifle-like gun. Additionally, unlike *Kanneh*, here, there is no affirmative evidence to show that the intruder tried to conceal the long, rifle-like gun he carried while being transported to Brown's home by Appellant. This case meets the evidentiary standards pronounced by the *Kanneh* Court, i.e. there is evidence here that supports an inference that the manner in which the weapon was handled would have made it visible to someone in the area, including Appellant. *See id*. at *2–3.

This case is also distinguishable from the facts presented in *Wooden v. State*, 101 S.W.3d 542, 543–45 (Tex. App.—Fort Worth 2003, pet. ref'd). In *Wooden*, the appellate court held that the evidence was legally insufficient to support the aggravating element of aggravated robbery because "there [was] no

evidence in the record that appellant knew the gun was in the car or that appellant aided or encouraged the other passenger to threaten [the complainant] with the gun." *Id*. at 548. In that case, there was no evidence that the defendant or his co-conspirators had previously planned the encounter with the victim. *See id*. Instead, the occurrence was more spontaneous, erupting in response to the victim confronting them. *Id*. at 543. In this case, from looking at all the evidence, the jury could infer, without direct evidence, that the aggravated robbery was planned. *See Merritt*, 368 S.W.3d at 525–26. Appellant arranged ahead of time to have someone else rent the truck that he used to carry the intruders to Brown's house. There is circumstantial evidence to support that he brought the intruders to Brown's house that morning, the intruders entered the house together, they were dressed similarly, they had a clear goal or target in mind (the money in the shoe box), took only the items they were there to get, left Brown's house at the same time, and rendezvoused with Appellant to make their escape. Additionally, the evidence supports that Appellant is a known drug dealer, known to rob other drug dealers, of which the evidence shows Appellant was one. The jury could infer from this that Appellant planned the heist. Finally, in this case, unlike *Wooden*, the evidence is that the gun was a long, rifle-like gun that was difficult to conceal. During closing argument, the prosecutor in *Wooden* argued that the defendant would have necessarily seen the gun, either when he entered the car or when the person with

the gun brought it into the car. *Id*. at 548. Apparently, in that case, there was no evidence to support an inference of this nature as the trial court sustained an objection and instructed the jury to disregard that statement. *Id*. However, no such objection or instruction occurred in this case. The jury in this case was allowed to consider the evidence that one of the intruders carried a long rifle-like gun that was bulky and difficult to conceal, and from that evidence, the jury could draw the reasonable inference that Appellant saw at least the long gun. *See Flores v. State*, No. 01-05-01016-CR, 2007 WL 2332516, at *3–4 (Tex. App.—Houston [1st Dist.] Aug. 16, 2997, pet. ref'd) (mem. op., not designated for publication) (holding that based on circumstantial evidence, the jury could rationally believe that appellant knew gunman was armed when he transported him to the scene of the robbery, that he saw the firearm when he observed the robbery, and that he saw both the firearm and the stolen items when the gunman returned to appellant's vehicle to flee the scene).

This case is also distinguishable from *Scott v. State*, 946 S.W.2d 166, 168 (Tex. App.—Austin 1997, pet. ref'd). There, the defendant was driving a vehicle with several passengers, only one of whom had a gun. *Id*. The passengers asked the defendant to pull over behind some apartments while they ran into a store. *Id*. The defendant complied and stayed in the vehicle listening to music while the others went inside the store. *Id*. When one of the passengers got out, defendant

thought he saw a revolver in one of the passenger's pockets. *Id*. The evidence showed that the driver did not have a view inside the store. A short time later, the passengers returned to the vehicle and told the defendant to go. *Id*. at 168–69. Once the defendant was driving away, the passengers told him they had robbed the store and there had been a shooting. *Id*. In this case, the evidence is that each of Appellant's passengers carried guns, not just one of them. One of the passengers carried a long, rifle-like gun. Unlike *Scott*, here, there is no evidence that Appellant's passengers kept Appellant in the dark as to their intent when they exited the vehicle and ran into Brown's house by kicking through the back door before 6 a.m. Surely, under the facts of this case, it was reasonable to infer that Appellant knew, if not planned, for the intruders to rob Brown that morning.

Finally, this case is clearly distinguishable from *Stephens*. *See* 717 S.W.2d at 340–41. In *Stephens*, a woman was abducted, taken to the bedroom of an apartment, threatened with physical harm, and raped multiple times. *Id*. at 383. There was evidence that the appellant rented the apartment where the rape occurred, was present in the apartment when the victim was raped, and had sex with the victim after she had been in the apartment for a while. *Id*. at 339. However, the record lacked evidence that the appellant was in the room when the victim was actually threatened and there was no evidence that the appellant knew the threat had been made. *Id*. at 339–40. Because there was no evidence to show

that the appellant knew the threat had been made, this Court held that the court of appeals correctly concluded the evidence was insufficient to support appellant's conviction for aggravated rape. *Id*. at 341. In *Stephens*, the appellant did not start out with the group of men that took the victim and brought her to the apartment. There was no evidence that the appellant had helped plan the offense with the other men. Unlike this case, in *Stephens*, there was direct evidence that the appellant did not hear the threat made to the victim and there was no evidence from which the jury could infer that he obviously would have heard the threat. In this case, there is no direct evidence that Appellant did not see the long gun carried by one of the intruders into Brown's home. The circumstantial evidence is that the gun was so large that Appellant would necessarily have seen it before the intruder entered the home. Thus, there was evidence from which the jury could infer Appellant's knowledge of the aggravating element of the offense.

Here, the jury's implicit conclusion is not based on speculation as stated by the Court of Appeals, but is properly based on reasonable inferences logically deduced from the evidence. The following syllogism reflects this point:

Major Premise:	A long, rifle-like gun is a large, bulky weapon difficult to conceal on one's person.
Major Premise:	An ordinary hoodie and pants are not capable of concealing a long, rifle-like gun.
Major Premise:	Passengers in a pick-up truck are in close proximity to one another.
Minor Premise:	One of the intruders, wearing a hoodie and pants, carried a long, rifle-like gun while riding with Appellant in a pick-up truck to Brown's house.
Conclusion:	Appellant observed the long, rifle-like gun when he transported the intruder to Brown's house before the robbery.

Under these circumstances, the jury was entitled to use its common sense in deducing that certain items by their very size and nature would be visible to people within a close proximity. Indeed, defense counsel expected the eyewitness to be able to see a rifle or long gun in one of the intruder's hands from a distance certainly greater than what would have existed inside the cab of a truck. What if, instead of a rifle, the intruder had been carrying a bazooka? Would the State be required to prove it was not concealed? Or, would the jury be allowed to employ its common sense and powers of deduction to determine whether the weapon was visible under the circumstances presented in the case? *See Williams v. State*, 473 S.W.3d 319, 327 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (considering type and size of weapon in holding that "juror could conclude that appellant, as the

getaway driver, knew [his co-conspirator] was armed with a deadly weapon and that the van contained multiple firearms—among them an AK-47—and numerous rounds of ammunition"). The Court of Appeals' decision in this case essentially prohibits the jury from making reasonable inferences from the evidence. The Court's opinion fails to reflect that the jury's implicit finding "was so insupportable as to fall below the threshold of bare rationality." *See Coleman*, 132 S. Ct. at 2065.

Additional incriminating evidence includes that Appellant is a drug dealer who was in the business of stealing from other drug dealers. Cormier, Brown's boyfriend at the time was a known drug dealer. The jury could reasonably infer that Appellant's plan the morning of the robbery was to steal from Cormier—a crime in which he was known to engage. Accordingly, the evidence shows that Appellant was more than just an ignorant getaway driver; he was the director of the offense, and, as such, would have known each person's role in the offense. Here, the aggravated robbery was well planned, and Appellant knew the plan. As such, it is a reasonable inference that Appellant knew as part of that plan, his co-conspirators planned to carry guns. *See Pauley v. State*, No. 05-12-01202-CR, 2014 WL 1018327, at *3 (Tex. App.—Dallas Mar. 6, 2014, pet. ref'd, untimely filed) (mem. op., not designated for publication) (holding that jury could have determined that appellant formulated and organized plan to commit offense and

lack of evidence concerning direct knowledge of gun is not dispositive because jury may make reasonable inferences from the evidence); *Rueda v. State*, No. 14-10-00849, 2011 WL 2150227, at * 4 (Tex. App.—Houston [14th Dist.] June 2, 2011, pet. ref'd) (mem. op., not designated for publication) (holding circumstantial evidence sufficient to allow jury to infer that driver was aware deadly weapon was used when appellant participated in well-planned robbery scheme); *Kirvin v. State*, No. 05-09-00382-CR, 2010 WL 3259798, at *5–6 (Tex. App.—Dallas Aug. 16, 2010, pet. ref'd) (not designated for publication) (considering defendant was inside contact and participated in planning and carrying out offense as evidence from which jury could infer he knew each person's role in the offense and acted with intent to promote or assist the principal offender in committing aggravated robbery); *Johnson v. State*, 6 S.W.3d 709, 713 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (holding evidence sufficient to support finding of deadly weapon when evidence revealed a thoroughly-planned robbery scheme in which appellant played important roles by scouting store and driving getaway car because evidence warrants inference that all three participants were aware of the details of the well-planned robberies including the weapon used).

To the extent Appellant contends that alternate reasonable inferences from the evidence favors him and were not disproved by the State, the State responds that it need not disprove all reasonable alternative hypotheses that are inconsistent

with Appellant's guilt. *See Wise*, 364 S.W.3d at 903. For example, there is some evidence in the record that Cormier indicated that he thought a Toyota 4-Runner might have been involved in the robbery.[68] There is no direct evidence of what that involvement included. There is no evidence in the record that the 4-Runner had dropped off the intruders, had planned to pick them up, or had any other involvement in the execution of the aggravated robbery. While a reasonable alternative hypothesis might be that the 4-Runner had dropped off the intruders instead of Appellant in the Toyota Tundra, that conclusion is not what the jury believed and it was not the State's obligation or burden to disprove that theory.

Here, the jury could have reasonably inferred from the evidence that before the robbery, the intruder would have necessarily exhibited the long, rifle-like gun to Appellant because he would have handled the gun in such a way that it would have been visible to Appellant at various times, including: (1) upon the intruder's entry into the truck with the long, rifle-like gun; (2) during the intruder's ride to the house inside a truck carrying four grown men and a long, rifle-like gun; (3) upon the intruder's exit from the truck with the long, rifle-like gun, or (4) as the intruder approached Brown's residence with the long, rifle-like gun while Appellant sat in the truck in front of the house waiting for their return. The verdict

[68] 4RR: 9–10, 71.

reflects that the jury inferred from the circumstantial evidence that Appellant was guilty of aggravated robbery. "This was not a determination so outrageous that no rational trier of fact could agree." *Merritt*, 368 S.W.3d at 527 (internal quotation omitted). This Court should defer to the jury's determination and conclude that the jury's inferences were reasonable and based on the cumulative force of the evidence when viewed in the light most favorable to the verdict. *See Murray*, 457 S.W.3d at 448; *Clayton*, 235 S.W.3d at 779 (explaining that a court of appeals should not consider circumstantial evidence in isolation but rather in conjunction with all circumstantial evidence admitted at trial).

CONCLUSION AND PRAYER

In conclusion, the Court of Appeals disregarded the reasonable inferences that the jury could deduce from the evidence presented, and, in so doing, the court erroneously concluded the evidence was insufficient to support Appellant's conviction for aggravated robbery. When viewed in the light most favorable to the jury's verdict, the evidence showed: (1) Appellant transported the intruders to Brown's house; (2) one of the intruders carried a long, rifle-like gun to the house; and (3) the intruder exhibited the long, rifle-like gun to Appellant before entering the house as he could not reasonably have concealed such a large weapon on his person under the facts presented to the jury. Accordingly, the evidence was legally sufficient to support the jury's implicit finding that Appellant was aware

that a firearm or other deadly weapon would be, was being, or had been used or exhibited during the robbery. Viewing all the evidence in the light most favorable to the jury's finding, this Court should hold the evidence sufficient to support the jury's finding Appellant guilty of aggravated robbery.

This State of Texas respectfully asks that the Court of Criminal Appeals reverse the decision of the Court of Appeals, and reinstate Appellant's conviction for aggravated robbery and the sentence assessed by the jury.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i), I certify that the number of words in this computer-generated brief is 7,382, excluding those matters listed in Rule 9.4(i)(l), as calculated by the Microsoft Word computer program used to prepare this document.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was sent by email utilizing the E-File system to Appellant's attorney, Lindsey Scott at lindsey@lindseyscottlaw.net. I further certify that a true and correct copy of this brief was served on Stacey Soule, the State Prosecuting Attorney through its service email address, information@spa.texas.gov on this 5th day of October, 2017.

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